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THE TRIPS AGREEMENT: A TEST OF THE WTO'S LEGITIMACY?

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Abstract

This paper examines the issue of legitimacy in international public law and its application to the World Trade Organization's (WTO) agreement on trade-related aspects of intellectual property rights (TRIPs). Since the signing of TRIPs in Marrakesh in April 1994 at the conclusion of the Uruguay Round of trade talks, a formidable compliance-implementation gap has curtailed the possibility of implementing an efficacious intellectual property rights regime on a global basis, a scenario which indicates that the deployment of extensive relational and structural power in trade negotiations does not axiomatically produce the desired transformative outcome within the domestic legislative framework of Member states. This paper argues that the principal reason why TRIPs has not been successfully transposed onto the legislative agenda of WTO Member States is because the agreement suffers from a legitimacy deficit which ultimately undermines not only the efficacy of the agreement itself, but also the authority of the WTO as a global governance institution. The paper also aims to demonstrate how legitimacy is a deep-seated aspect of global governance, given that states are unlikely to abide by norms, rules and decisions taken at institutional level unless they are perceived to provide mutual benefits that render them legitimate. In order to assess the legitimacy of TRIPs as an internationally-binding agreement, this paper begins by outlining the basic tenets of legitimacy in global governance and examines the ostensible benefits of adherence to the precepts of global governance for members, namely reciprocal benefits and lower transaction costs. Expanding upon the work undertaken in this area by Daya Shanker (2002), this paper then seeks to apply Peter Drahos' theory of democratic bargaining among sovereign states onto the negotiating process that led to the appearance of TRIPs within the WTO in order to determine whether the negotiations that led to TRIPs agreement adheres to that theory's test of legitimacy.

Introduction

The study of the concept of legitimacy in the realm of international relations and political science occupies a highly significant place within the disciplines as it envisages the possibility of an orderly community functioning by consent and validated obligation (Shanker, 2002). However, defining legitimacy or the essence of what renders agreements and/or those institutions, regimes and organisations which promulgate such agreements legitimate, is multi-variegated and problematic. Max Weber, for example, outlined how legitimacy is predicated upon an amalgam of charismatic authority, traditional authority and rational or legal authority (Weber, 1947). In his seminal study, *Political Man: The Social Bases of Politics* (1960: 88), Seymour Martin Lipset contended that: "legitimacy involves the capacity of the [political] system to engender and maintain the belief that the existing political

institutions are the most appropriate ones for society". It can be determined moreover, that the legitimacy of institutions emanates not merely from "inputs", e.g. procedures and accountability, but also from "outputs", i.e. the ability to deliver results (Keohane, 2006). Legitimacy can also be derived through elections and a majority vote for representatives who reflect the political will of a community (à la Rousseau); although it is important to stress that legitimacy is not derived merely as a function of decision-making by majority vote, particularly in a non-democratic election. On the other hand, governing institutions may derive authority and public acceptance based on reason and on the efficacy of the outcomes that such institutions generate, in the Kantian tradition (Esty, 2002: 9). Ultimately, institutions obtain and maintain their legitimacy and authority based on their ability to deliver positive outcomes and from their systemic ties to other institutions (checks and balances) which provide an indirect link to those who have legitimacy derived through democratic elections (ibid, 2002: 16). With regard to the legitimacy of particular agreements, it can be asserted that the value of a potential agreement to its prospective participants depends, in part, on how consistent the agreement is with principles of legitimacy embodied in international regimes (Keohane, 1984: 92). Similarly, Susan Strange contends that agreements are authoritative if parties regard them as compulsory and binding and the agreements alter outcomes for other parties (Strange, 1996:184).

For the purposes of this paper, legitimacy will be defined as a concept which involves the normative evaluation of a group or organisation by other members of society in which the actions taken by such a group, institution, regime or organisation, are beneficial, correct and apposite within a socially constructed system of beliefs, norms and values. To this end, Thomas Franck's theory of legitimacy will be invoked in order to help ascertain the extent of the TRIPs Agreement's legitimacy among Member states of the WTO. Franck (1990: 24) defined legitimacy as "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process" (Franck, 1990: 24). In the context of the WTO's agreement on intellectual property, legitimacy is essential not merely for the agreement to enjoy "compliance pull", but also to ensure the implementation of TRIPs into the legislative programme of each of the WTO's Member states. When denuded of legitimacy, international agreements, such as TRIPs, cede their ability to induce consent among member states. Similarly, an institution or regime may erode, even when perfectly rationally designed, because its legitimacy is undermined (Kratochwil and Ruggie, 1986).

Legitimacy at global governance level

Within the realm of global governance, legitimacy implies that there exists a form of normative, non-coerced consent or recognition of authority on the part of those being governed. Four basic organising principles on which governance, as a social institution, may be founded were identified by Benjamin Cohen (1977) as: (i) Automaticity-a self-disciplining structure of rules and norms which are binding for all member states; (ii) Supranationality-a structure based on collective adherence to the decisions of an autonomous international organisation; (iii) Negotiation-a structure encompassing shared responsibilities and decision-making; and (iv) Hegemony-a structure organised around a single dominant state or group of dominant states with acknowledged leadership responsibilities and privileges. As a collective action problem afflicts the regulation and institutionalisation of trade and finance within the international system, the presence of a hegemon, or stabiliser, is required within the global economy to ensure that public goods are provided which benefit society collectively (Kindleberger, 1973). However, analogous to providing public goods, a hegemon can equally undermine the credibility and rules of a global governance institution, such as the WTO, by exceeding the boundaries established by its role. When international organisations, which act as the chief legitimising agents of global politics, are undermined by a hegemon superseding its institutional remit, the legitimacy of the international order itself is endangered (Cronin, 2001: 113). It is instructive to note that prescriptive multilateralism has not always adhered to the "Kantian tradition" of progressive assimilation into a rules-based institution, but has, on occasion, relied upon coercive socialisation and hegemonic imposition in order to achieve its ends (Hurrell, 2006).

The question of compliance, or why states comply with the rules, norms and decision-making procedures of global governance institutions, encapsulates the essence of a fundamental characteristic of power and governance, namely how the attribute of legitimacy compels actors to obey rules without coercion. Global governance institutions, such as the WTO, theoretically reduce transaction costs and, proponents claim, provide public goods such as rules-based mechanisms to induce peaceful resolution of conflicts such as trade wars. As Pascal Lamy, later Director-General of the WTO, declared on the eve of the ill-fated 2003 WTO Ministerial Conference in Cancún: "The WTO helps us move from a Hobbesian world of lawlessness into a more Kantian world - perhaps not exactly of perpetual peace, but at least one where trade relations are subject to the rule of law" (Lamy, 2003: 29). However, in order for an institution such as the WTO to acquire legitimacy, it must do so at the normative and descriptive levels. In normative terms, legitimacy refers to the validity pertaining to political decisions emanating from that institution. An institution is legitimate in the normative sense when it is deemed to have the right to rule (Buchanan and Keohane, 2006). In descriptive

terms, legitimacy refers to how decisions are accepted at societal level and the degree to which subjects or citizens accord legitimacy to those decisions.

Global governance institutions are deemed valuable to the international system as they create norms and information which enable Member states and other actors to co-ordinate their behaviour in ways that should result in mutual benefit to all actors within the system. Within a global governance institution, such as the WTO, Member states and other international actors acknowledge that membership entails the recognition of certain obligations and norms. As a consequence, there is an attendant onus upon those Members to adhere to the institution's precepts. Members accept the legitimacy of the rules and norms, along with the validity of decision-making procedures, of such institutions because they expect other states and actors to comply and to use dispute settlement procedures in order to resolve disputes. Participants in a multilateral institution believe that outcomes will yield what Robert Keohane (1984) terms "diffuse reciprocity". WTO Members expect that the principle of non-discrimination or Most Favoured Nation (MFN), which prevents countries from discriminating against goods and services emanating from another WTO Member state, will apply to the multilateral trading system.

The contentious question of legitimacy pertaining to global governance institutions has grown in parallel to the powers accorded such institutions. As the power of institutions such as the WTO has evolved, a concomitant level of scrutiny has arisen to monitor the workings and implications of decisions taken by such organisations. Martin Wolf's (2001: 183) depiction of the GATT/WTO as an institution once blighted by "ignorant indifference" and now subject to "equally ignorant malevolence" by opponents of the global trade regime, may be crude and ultimately inaccurate, but it serves to highlight how issues discussed within the GATT/WTO have moved from being the purview of an epistemic community of trade specialists to problems which concern (and occasionally infuriate) a vast swathe of global public opinion.

The WTO provides a framework of "governance" in regard to the rules of trade rather than acting as a globalised form of trade 'government'. The organisation acts as a forum for the creation of a rules-based multilateral trading system and attaches significant consequences to states that failure to comply with such rules. Nevertheless, the WTO, in tandem with other global governance institutions such as the World Bank and the International Monetary Fund (IMF), cannot claim to perform the full range of the functions of government within a permanently demarcated territory. Nevertheless, membership of the WTO is a virtual *sine qua non* for a society or state that wishes to be integrated effectively into the world economy - a status which requires accepting a large number of invasive rules, many of which undermine the sovereign status of states within the international system.

Since its inception in January 1995 the WTO as a multilateral institution has drifted from mini-crisis (vide the 1999 Ministerial Conference in Seattle) to stasis within the Doha Development Round since its initiation in November 2001; while its institutional legitimacy has been perennially brought into question. The post-World War II international order that was predicated upon 'decomposable hierarchies' (Esty, 2002: 7), has latterly begun to fragment and a new, more complex and fluid international system is emerging. However, the architecture of the new system has serious structural flaws, primarily because so little attention has been granted to what is required to establish the legitimacy of international organisations and of the legitimacy of the WTO and its newly self-acquired competences in areas such as intellectual property rights, in particular.

The theme of legitimacy in the multilateral trading system was articulated by Joseph Stiglitz (2000) in a paper given prior to the ill-fated Seattle Ministerial Conference of the WTO in 1999, in which Stiglitz emphasised that international organisations, such as the WTO, are directly accountable not to the citizenry but to national governments and particularly to agencies within those governments. International organisations thereby lack the democratic legitimacy that is directly derived from the electoral process and must therefore obtain their legitimacy from the manner in which they procure good outcomes for the citizenry. Stiglitz (2000) argues that:

If policies are forged on the basis of widespread international discussions, a process of global consensus building, then their legitimacy is enhanced. If by contrast, policies seem to reflect the power of a few large countries (the G-7, the G-3 or the G-1), then their legitimacy is reduced. If the policies seem to reflect special interests, legitimacy is reduced (Stiglitz, 2000: 38-9).

If, in order to acquire legitimacy, public policies require the endorsement (and in some cases, consultation) of all affected by such policies, it follows that global policy making must depend on the widest possible participation on a global scale. Significantly, Daniel Esty (2002) affirms that "as a general rule, people appear more willing to cede authority to 'expert' decision making in realms that are perceived to be technical or scientific" (Esty, 2002: 9). In the realm of intellectual property and in the context of the TRIPs Agreement, this assertion appears to carry particular validity. Peter Haas introduced the term epistemic communities into the ambit of international relations discourse in 1989 in order to describe the emergence of international pressure groups of experts who share highly specialised technical knowledge. The long omission of intellectual property from political philosophy, and other intellectual traditions such as political economy, rendered it a rather arcane and esoteric subject to those outside the legal community. It is telling that intellectual property as a vector of structural power in the global political economy was neglected for almost a century after the signing of the Paris Convention for the

Protection of Industrial Property in 1883. The pre-eminent reason why intellectual property was so disregarded historically within political science and international relations is that the development of policy and law in the area has been within the purview of such an epistemic community of actors, consisting primarily of technically minded lawyers, in whose hands intellectual property had developed into highly differentiated and complex systems of rules (Drahos, 1999: 18). Within the framework of TRIPs, a small coterie of intellectual property lawyers derived a large degree of authority by having unrivalled access to technical knowledge and expertise in the arena of intellectual property law and was able to utilise this authority in order to impose the issue of intellectual property rights onto the agenda of the Uruguay Round of trade negotiations.

Systems of intellectual property that have been implemented since the first international agreement Paris Convention (1883), such as TRIPs, have been influenced profoundly by the narrow and often unarticulated professional values of this epistemic community. Prior to the Third WTO Ministerial Conference in Seattle in November and December 1999, the multilateral trading system was beholden to extensive public apathy, a standpoint which facilitated the perception that international economics and the formulation of trade policy were decidedly technical realms, expertise in which was best ceded to a select cadre of qualified experts. The legitimacy of the GATT system was based almost entirely upon its perceived efficacy and its value as a central component of the international management structure. Public perceptions regarding trade and trade policy, and intellectual property rights in particular, have altered significantly since the aborted Seattle Ministerial Conference. Trade-related issues, such as intellectual property rights, are no longer considered an obscure policy domain best left to an epistemic community of technical experts. As a consequence, the trade regime can no longer “function on the basis of technocratic rationality and quiet accomplishments” (Esty, 2002:10). Accordingly, the WTO as an institution of global governance and its attendant agreements, such as TRIPs, requires a new foundation for its legitimacy.

Thomas Franck’s theory of legitimacy applied to the text of TRIPs

Thomas Franck’s theory of legitimacy in international rule-making institutions provides a robust framework for interpreting and analysing the efficacy and ultimately, legitimacy, of the WTO’s agreement on intellectual property rights. Franck’s legitimacy theory envisages the possibility of an orderly community functioning by consent and obligation. The legitimacy of a rule, or rule-enforcing institution, is a function of perception of those in the community “concerned that the rule, or institution, has come into being endowed with legitimacy; that is in accordance with right process” (Franck, 1990: 19). Because states constitute a

community, legitimacy has the power to influence their conduct. While the legitimacy of rules will vary in degree from rule to rule and from time to time, within a community organised around rules, compliance is secured at least in part by a perception of a rule being legitimate by those subjects to whom it is addressed. The trade regime's evolving mission, in which it has assumed competence in issues that extend far beyond the narrow scope of the General Agreement on Tariff and Trade (GATT) and extended itself into issues such as intellectual property rights, rules on investment, and trade in services, has undoubtedly added to the WTO's legitimacy dilemma. In order for rules and agreements, such as TRIPs, to claim legitimacy, Franck outlined four factors which must pertain, namely:

1. **Determinacy:** Explicitly "the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to its essential meaning" (Franck, 1990: 30) or more cogently, "the linguistic or literary-structural component of legitimacy" (Franck, 1988: 725);
2. **Symbolic Validation:** When the rule "signals that authority is being exercised in accordance with right process, that it is institutionally recognised and validated" (Franck, 1990: 34). Symbolic validation, therefore, serves to legitimise rules (Franck, 1988: 735);
3. **Coherence:** "When a rule whatever its content is applied uniformly in every 'similar' or 'applicable' situation" (Franck, 1990: 39);
4. **Adherence** (to a normative hierarchy): Namely when the rule "is demonstrably supported by the procedural and institutional framework within which the community organises itself" (ibid, 1990: 41).

With regard to determinacy, the TRIPs Agreement should fulfil Franck's essential prerequisite, namely that the rule clearly conveys its meaning. However, what is perceptible to anyone who has sought to disentangle the legal intricacies of TRIPs is that major weaknesses within the agreement inhibit its efficacy and render it amenable to interpretation by epistemic communities with a significant stake in promulgating a globalised intellectual property rights regime favourable to particular interest groups. A further fundamental deficiency in realm of determinacy is that the agreement's scope is not only ambiguous but also unpredictable. Concomitantly, the TRIPs Agreement relies for interpretation not only upon the legislative predilections of certain industry groupings, but also upon judicial and non-judicial institutions that are overwhelming based in countries that have already attained a high level of industrialisation (Shanker, 2002: 158). The reliance upon epistemic communities of trade lawyers and industry experts to interpret TRIPs on behalf of national legislatures has the potential to destabilise the agreement's legitimacy. In addition to the difficulties of interpretation, the agreement also fails to seriously address the problems caused by newer technologies which are not consistent with classical patent and copyright

paradigms such as information technology software, and offers solutions to such dilemmas which could be best and most benignly described as *maladroit*.

Another crucial flaw of the TRIPs Agreement from the point of view of determinacy is that there is little consensus among WTO member states regarding rudimentary issues within the text of TRIPs such as the subject matter of protection. For example, there is intense disagreement among several WTO Members as to whether computer programs, pharmaceutical products and processes, new varieties of plants, and micro-organisms (specifically in relation to Article 27.3b of TRIPs) should be subject to intellectual property protection, and even in those areas where consensus has been achieved, there still remains profound discord on what the duration of such intellectual property rights protection should entail. For example, the agreement controversially and divisively requires that computer programs be protected as literary works of art under the Berne Convention for the Protection of Literary and Artistic Works (WIPO, 1996: 20). Extensive indeterminacy within the TRIPs Agreement is also to be found in the opening paragraphs of the text. Article 1.1 of TRIPs, for example, which states that “members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection doesn’t contravene the provisions of this Agreement”¹, is very ambiguous and thereby privy to hermeneutical free play (and consequent non-compliance) by WTO Members. The TRIPs Agreement states that WTO Members must implement minimum standards of intellectual property rights protection. As a consequence Article 1.1 leaves open the possibility of so-called “TRIPs-Plus” provisions being sought in bilateral or regional trade talks by those actors capable of harnessing structural power to implement a globalised “trade-related” agenda in intellectual property rights protection.

Thomas Franck developed two concepts under the principle of symbolic validation, namely “ritual” and “pedigree”. While “ritual” has little resonance with the TRIPs Agreement, “pedigree” as a concept has particular significance within TRIPs. The historical origin and deep-rootedness of any international treaty, in tandem with the codification practice followed by the International Law Commission (ILC) and the unanimous decisions of the International Court of Justice (ICJ), improves the compliance pull of an international treaty (Shanker, 2002: 184). “Pedigree” refers not merely to historical precedent but rather to the fact that the institution or person responsible for the rule in question must be perceived as “deserving to be obeyed” or “deserving to be taken seriously” (Franck, 1990: 95). If it can be ascertained that coercion was used to induce compliance in the formation of TRIPs, then that salient factor would render it difficult for members to regard the Agreement as “deserving

¹ Art. 1 in Agreement on Trade Related Aspects of Intellectual Property Rights, 2002. Geneva: WIPO Publications, Art.10.1, p. 15

to be obeyed" or "deserving to be taken seriously" and therefore a legitimate international treaty. Conversely, if it can be verified that democratic bargaining amongst states was the basis upon which the TRIPs negotiations took place, then the treaty can be classified as conforming to Franck's criteria of legitimacy. However, if TRIPs does not meet the minimal conditions of democratic bargaining, questions about the efficacy and legitimacy of the Agreement must be entertained. Franck's third criterion, namely Coherence, emphasises that a rule is coherent when its application treats like cases alike, and when the rule relates in a principled fashion to other rules of the same system (Franck, 1990: 38). This criterion of coherence can be applied to the principle of non-discrimination or most favoured nation within the WTO. However, since TRIPs has come into existence there is only partial congruence among Members regarding issues such as the novelty and non-obviousness standards of eligibility; the limitations and exceptions that pertain to exclusive rights;² and what exceptions and flexibilities regarding, for example the compulsory licensing and importation of generic medicines, that WTO Members should be allowed to avail of under Articles 30 and 31 of TRIPs (to take but one egregious example,. Depending upon one's interpretation of the text, it could be posited that Articles 30 and 31 of TRIPs permit WTO Member states sufficient scope to indulge in trade protectionism, a concept which contravenes the trade liberalisation regime and Most Favoured Nation (MFN) concept upon which the institutional authority of the WTO is predicated. The flexibility that permits WTO members to avail of provisions allowing for a modicum of protectionism under Articles 30 and 31, fundamentally changes the concept of TRIPs and, as Raya Shanker states, "raises questions about its validity" (Shanker, 2002: 21).

Franck's fourth criterion, namely adherence to a normative hierarchy and community, in order for a rule to be assigned legitimacy, is also potentially undermined when reflected in the TRIPs Agreement, as there is little or no agreement among Member states regarding the primacy of domestic law or the prioritising of international public law regarding specific articles of TRIPs. For example, many states have interpreted the provisions of Article 27.3 (b) of the Agreement³ relating to the protection of new varieties of plants as allowing for them to implement an indigenous sui generis system of protection within their own

² 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder', Art. 13, in *Agreement on Trade Related Aspects of Intellectual Property Rights*, 2002. Geneva: WIPO Publications, Art.10.1, p. 21

³ Article 27. 3(b) of the TRIPs Agreement states that:

Member-states of the WTO may exclude from patentability: Plants and animals other than micro organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. (WIPO, 1996: 31).

legislative framework, while the Council of UPOV (The Union for the Protection of New Varieties of Plants Convention) insists that such a provision behoves Member states of the WTO joining UPOV and subsuming their own domestic legislation on the issue of the protection of new varieties of plants to a supra-national authority. The ambiguity and misunderstanding wrought by Article 27.3 (b) of TRIPs has rendered WTO Members less amenable to defining a cohesive community of states within the multilateral trading regime, thereby compromising further the legitimacy of the TRIPs Agreement.

While it can be ascertained that the text of TRIPs fails the primary criteria of Franck's theory of legitimacy in international rule-making institutions, it may be instructive to examine under which negotiating conditions and diplomatic bargaining processes the TRIPs Agreement came into existence. Such a strategy may help to further ascertain whether TRIPs fulfils any of the criteria necessary for an international agreement to become legitimate. Fen Osler Hampson (1995:6) outlined how negotiations have become management tools in international politics which are the diplomatic bargaining processes through which international society confers legitimacy or comes to accept generalised principles. Within a multilateral framework, in order for cooperative solutions and legitimate agreements to emerge between negotiating parties to a globalised intellectual property rights regime, conditions of democratic bargaining, i.e. conditions that allow genuine bargaining to take place, must pertain

Drahos' theory of democratic bargaining between sovereign states applied to the process of diplomatic bargaining that lead to TRIPs

Peter Drahos (2002) has devised a theory of democratic bargaining between sovereign states which can complement Franck's theory of legitimacy in international rule-making institutions by examining the negotiating process in the Uruguay Round of trade talks that brought the agreement on intellectual property rights within the ambit of the WTO. Where Franck's theory allowed us to examine the legitimacy of TRIPs by assessment of aspects of the text itself, Drahos's theory of democratic bargaining permits us to test the legality and efficacy of TRIPs vis-à-vis the diplomatic bargaining processes that brought the agreement into place. Drahos outlined three conditions that must pertain in order for democratic bargaining between sovereign states to hold, namely the condition of representation, the condition of full information, and the condition of non-coercion or non-domination. In order for the first condition, namely the condition of representation to hold, all relevant interests have to be represented in the negotiating process. The condition of representation does not entail the participation of all parties to the negotiations at every stage of the process or equality of outcome for all interests, but it does

necessitate that parties are represented at shoes stages of the process relevant to their respective interests. The second stipulation, namely the condition of full information, pertains where all those involved in the negotiating process are accorded full cognisance about the consequences of various possible outcomes. The third criterion, the condition of non-coercion or non-domination, applies where a party to a negotiating process refrains from employing coercion in order to induce the compliance of the other participants.

Ostensibly, this condition of full representation was met when undertaking a cursory examination of the negotiations that led to TRIPs being inserted into the Marrakesh Agreement Establishing the World Trade Organization in April 1994. It may even be possible for proponents of the Agreement to argue that TRIPs emanated from a process of democratic bargaining among sovereign states, all of whom had the capability and capacity to conclude treaties. This position concurs with that of the United Nations Development Programme (UNDP), which states that:

The WTO is the most democratic of all the international institutions with a global mandate. Its one-country, one-vote system of governance makes it far more democratic than the Bretton Woods institutions-the World Bank and the International Monetary Fund (IMF). That it lacks the equivalent of the Security Council makes it, in a structural sense, even more democratic than the UN, though its membership is not as broad (United Nations Development Programme, 2003: 54)

While many developing countries did not send representatives to the TRIPs negotiations during the Uruguay Round, the most important GATT Contracting Parties with regard to intellectual property in the southern hemisphere, namely Brazil and India, were represented throughout the negotiations. The concept of representation in democratic bargaining is contingent upon representatives of member states having some continuity of voice in the process and not being excluded at any stage of negotiations (Drahos, 2002). GATT was chosen as the forum in which to negotiate a globalised intellectual property rights regime as that institution was deemed less amenable to the perspective of developing countries than the World Intellectual Property Organization (WIPO) that administered treaties on intellectual property; while GATT was also a forum in which the United States in the 1980s was the single most influential player, as the multilateral trading system is deemed to be congruent with American interests "ninety-five per cent of the time" (Friedman, 2001: 19).

With the extension of membership a new negotiating system was created within the GATT framework, ostensibly to render the process of negotiation more efficient, whereby issues are discussed within a small "circle of consensus" (involving the

United States, Japan and the European Community) and then presented to larger groupings in what is known informally within the WTO as the “Green Room” process. Jacques Gorlin, one of the more significant architects of the TRIPs Agreement, describes the Green Room process as one where:

Negotiators from all engaged countries face each other across the table (traditionally in the Green Room on the main floor of the WTO Building) and negotiate. Drafts are exchanged and progress is noted as differences are narrowed and brackets are removed in successive drafts (Gorlin, 1999: 4).

Prior to the Uruguay Round, negotiations within the GATT were highly unrepresentative of the organisation’s membership. For example, in the Tokyo Round of trade talks that took place under the auspices of the GATT from 1973 to 1979, a Framework of Understanding was released by the EEC, Japan, the USA, Switzerland, New Zealand, Austria and the Nordic Countries (Finland, Iceland, Norway, Sweden) in July 1978 that set out the principal elements of a concluding deal. Despite the indignation voiced by certain developing countries at the absence of any consultative process involving them, GATT Director-General Oliver Long stated that the tactic of exclusion was a *practical necessity* [author’s italics] in order to ensure progress (GATT, 1979). At the start of the Uruguay Round in Punta del Este in September, 1986 underlying problems regarding the representation of all relevant Contracting Parties to the GATT⁴ still existed. After the negotiations on the intricate details of TRIPs began in 1990, for example, only three “circles of consensus” within the Green Room system mattered, namely: the United States and Europe (Circle 1); the United States, Europe and Japan (Circle 2); and the “Quad” of the United States, Europe, Japan, and Canada (Circle 3).

Through the use of these “circles of consensus” the process of negotiating TRIPs became one of hierarchical rather than democratic management: Only the inner circles of consensus knew what TRIPs had to contain and worked on those in the outer circles until the agreement of all groups to a text had been obtained (Drahos with Braithwaite, 2002: 168). The reduced numbers of negotiators conferred upon the “Quad” agenda-setting and issue-framing power as the possibility of the “Group of Ten” forming a coherent “blocking vote” on TRIPs was effectively stymied given that so many Contracting Parties of the GATT with an interest in the negotiations were effectively excluded. It was within these informal groupings that much of the real negotiating was done and where the consensus and agreement that mattered was acquired.

⁴ In the General Agreement on Tariffs and Trade (GATT) states were referred to as ‘Contracting Parties’; After the GATT’s successor organisation, the WTO, came into being in 1995, states that are party to the new organisation are referred to formally as ‘Members’.

Once the group of “five plus five” (five developed and five developing countries) was convened to undertake negotiations on the issues of intellectual property protection and trade in services, the results of the group’s negotiations were presented as an agreed package to a larger group of member states, known informally as “10 plus 10” (10 developed and 10 developing countries). The group of “10 plus 10” GATT Contracting Parties then presented the agreed proposal to a group of 30 or more states that received the proposal as a consensus text. After that, the proposal was placed before the Ministerial Conference for formal endorsement. This form of diplomatic bargaining effectively meant that the result of the “five plus five” negotiations on TRIPs represented a consensus that needed no further substantive discussion (Adede, 2001: 15).

Although the negotiators representing powerful developing countries such as India and Brazil were initially able to formulate counter-proposals to the TRIPs Agreement, these proposals were evaluated by legal experts from US industry, who were ultimately able to advise the US government negotiating team in Geneva how to undermine developing country arguments, with the effect that superior US technical expertise prevailed during the TRIPs negotiations (Matthews, D, 2002: 44). While it is standard procedure in democratic bargaining for small groups to convene to discuss technical issues, the deficiency in the TRIPs negotiations was that the agreement was imposed on several groups representing states that were not privy to such technical discussions (Ricupero, 2001: 47). As decisions taken informally within the WTO can lead to the acceptance of new international obligations such as legislation to be incorporated into national law, expensive adjustments and administration, it is imperative for all WTO Members to be represented in decision-making processes within the multilateral trading system in order to obviate the manifestation of a ‘legitimacy gap’. The transparent failure to ensure that the criterion of full representation was adhered to during the TRIPs negotiations casts further doubts over the legitimacy of the Agreement utilising Drahos’s criteria for democratic bargaining among sovereign states.

The second criterion of democratic bargaining outlined by Drahos, namely the condition of full information, was undermined during the TRIPs negotiations by the inner “circles of consensus” that pertained throughout the negotiations. Whenever the inner “circles of consensus” at the TRIPs negotiations needed higher levels of secrecy during the talks they could form a smaller negotiating alliance. The US and EC could move amongst all key groups throughout the TRIPs negotiations which allowed them to build up a consensus whenever one was required and to accumulate more information than anyone else about the overall negotiations. The use of circles of consensus in the formulation of the TRIPs Agreement gave the negotiations all the transparency of a one-way mirror (Drahos, 2002: 169).

The third prerequisite of democratic bargaining, namely the condition of non-coercion or non-domination as applied to the TRIPs negotiations does not necessarily hold upon scrutiny and thus also serves to potentially undermine the legitimacy of the Agreement as an international accord. The extensive use of Section 301 of the 1974 United States Trade Act, in tandem with the threat to withdraw benefits under the Generalized System of Preferences (GSP) programme, acted as unilateral coercive instruments throughout the Uruguay Round negotiations in order to induce compliance with TRIPs among those states unwilling to amend their intellectual property rights legislation voluntarily. Section 301 of the 1974 US Trade Act permits the President of the USA to impose commercial sanctions, such as an import ban or quota, upon any country that is deemed to be infringing trade agreements or maintaining laws or practices restrictive or inimical to US commerce. The Omnibus Trade and Competitiveness Act of 1988 introduced a new provision to the 1974 Act called "Special 301" legislation to deal specifically with those countries whose protection of intellectual property was deemed insufficient and a barrier to US trade.

In the immediate aftermath of the passing of the Omnibus Trade and Competitiveness Act, India was among those countries identified as an alleged violator of American intellectual property by the Office of the United States Trade Representative (USTR), and placed on the "Special 301 Priority Watch List". Although several dozen countries have been placed on the "Priority Watch List", the main targets of the USTR were those relatively powerful developing countries that had begun to develop their own generics pharmaceutical industries, e.g. India, Argentina, Brazil, Thailand and Taiwan. "Special 301" was formulated to grant the USTR the opportunity to exercise relational power in trade diplomacy by pressurising countries placed on the Watch List to change their behaviour vis-à-vis the protection of intellectual property emanating from the United States. The ramifications of "Special 301" as a coercive bargaining instrument were immediately felt within the Uruguay Round negotiations, according to former Indian ambassador to the GATT, BL Das:

After "Special 301" was brought into the legislative apparatus of the United States there was tremendous political pressure placed on us in the sense that we were assured that we were friends and that if we didn't agree with what the more powerful developed countries wanted that we would be enemies. This pressure was coming from the multinational pharmaceutical lobby which had tremendous penetration into various instruments of government in developed countries. And this pressure came from various other sources. It didn't come from only the USTR but also from other governments in developed countries (Das, BL, 2004: interview with author).

Almost 15 years after the new multilateral trading system came into existence in 1995, "Section 301" and "Special 301" remain in place as coercive, unilateral, trade policy instruments of the USTR, despite their obvious contravention of the Most Favoured Nation (MFN) principle upon which the normative edifice of the WTO is based. It is incontrovertible that coercion has been the most significant factor in the dissemination of intellectual property norms within the multilateral trading system, and that the use of coercion in the promulgation of TRIPs casts grave misgivings on the legitimacy of the Agreement as an international accord.

Conclusion

This article asserts that legitimacy is a necessary precondition of TRIPs as perceptions that the agreement is not a legitimate binding international accord have led WTO Members to prevaricate on compliance and implementation measures, a scenario which indicates that structural power may not be sufficient to bring about a reconfiguration of the intellectual property rights regime on a global scale. States comply with the rules, norms and decision-making procedure of global governance institutions, such as the WTO, when such institutions are based on shared interests, reciprocal exchange or coercion, or because they see no better choice when powerful states have unilaterally altered the status quo (Sell, 2003). In the Uruguay Round of trade negotiations, the choice facing most developing country WTO Members on the issue of intellectual property rights was between acceptance of the TRIPs Agreement or the imposition of "Section 301", "Special 301" and/or "Super 301" measures by the Office of the United States Trade Representative in order to ensure compliance to intellectual property norms which prioritised the private rights of knowledge-intensive industries.

It can be concluded that in the TRIPs negotiations, OECD members and developing countries did not agree to the new globalised intellectual property regime on the basis of shared interests. While there were aspects of "diffuse reciprocity" - such as different implementation deadlines for developing and least developed countries- the TRIPs negotiations took place under certain conditions of unilateral economic coercion, lack of representation and information for all participants, in tandem with obvious large asymmetries of power between various Contracting Parties. If democratic bargaining, as outlined by Drahos (2002) is a necessary prerequisite to the workings of a global governance institution, such as the WTO, then the ability of powerful actors to induce acceptance from other members utilising instruments of coercion, or flouting the rules of the institution to indulge in parallel unilateral acts of coercive trade diplomacy, help to undermine the workings and legitimacy of that institution.

When refracted through the theory of legitimacy enunciated by Thomas Franck and the theory of democratic bargaining among sovereign states devised by Peter Drahos, it can be asserted that the TRIPs Agreement fails the tests of legitimacy, if not necessarily that of efficacy. An enormous degree of influence was exercised in the Uruguay Round by industries and states that created linkages between the issue of strong intellectual property protection and trade competitiveness. These agents created a framework that allowed for the imposition of minimum standards of intellectual property protection that hitherto had not formed part of the existing provisions in the domestic laws of WTO Member states. While the ideology that underpins the WTO can lay claim to a long historical patrimony dating from Adam Smith's *Inquiry into the Nature and Causes of the Wealth of Nations*, the TRIPs Agreement itself fails to adhere to many of the precepts of trade liberalisation and the agreement's classification as a "trade-related" accord is highly contentious, even among strong proponents of globalization, e.g. Jagdish Bhagwati (2004).

The "aggressive unilateralism" which underpinned the negotiating stance taken by the Office of the United States Representative (USTR) on the issue of intellectual property indicates that TRIPs is unlikely to provide those mutual benefits which participants in the multilateral system expect negotiations to yield. The extraordinary influence exhibited by private power, in the form of ad-hoc lobby groups in codifying protectionist intellectual property norms that were antithetical to those prevailing in many countries, which were or later became WTO Members, could potentially undermine the legitimacy of TRIPs among WTO Members. The normative implications of the wielding of such private power in the public realm are immense, as it indicates that the formulation of public policy within global governance institutions is systematically biased in favour of particular private economic and industrial interests, thereby undermining democratic accountability, political equality and ultimately the legitimacy of political outcomes. In conclusion, it can be asserted that TRIPs has not been successfully and widely transposed onto the legislative agenda of WTO Member States primarily because the agreement's influence is impaired by a legitimacy deficit which ultimately undermines not only the efficacy of the agreement itself, but also the authority of the WTO as a global governance institution.

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